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No. 06-486

In The
Supreme Court of the United States

LOG FURNITURE, INC. and CARI ALLEN,
Petitioners,

v.

STEVEN CALL; RAY, QUINNEY & NEBEKER; GRANITE STONE, L.C.; MACHINERY HARDWARE & SUPPLY, INC.; and DAVID HARRIS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Respondents challenge Petitioners' Statement of Facts in the case with only their own characterizations of facts and conclusions about them. Their central premise is that their version of facts should govern as to the main issue in dispute: Who owned the stock of Log Furniture, Inc. at the time an entity claiming to be a shareholder, but who was not, purported to file the corporation into bankruptcy? That is the issue, however, not the starting point of the controversy or proper analysis.

Respondents baldly claim Petitioners lack standing and that a corporate chapter 7 debtor is not entitled to legal representation to challenge an imposter purporting to act in its behalf in placing it into bankruptcy while disregarding traditional concepts of concrete stake in outcome of controversy, etc., Baker v. Carr, 369 U.S. 186 (1962). The essence of Respondents' argument is the notion that the corporate entity does not exist and therefore does not have standing as a non-entity because a series of lower courts have all ignored the fundamental flaw of the prerequisite starting point of analysis-who owned the stock; and that the "piling on" by subsequent courts of an initially unexamined premise makes it unreviewable. Respondents' position is that an appeal is not warranted simply because lower courts have ruled the way they have. Respondents forget that this is precisely why the Supreme Court exists: lower courts have historically, do currently, and will in the future, err. It matters not if one thousand lower courts or nineteen (the wrong number used by Respondents) rule that "separate but equal education" is constitutional, if they erred, they erred. Incidentally, two of the nine courts ruled in favor of the Petitioners.

Despite Respondents' protestations that Petitioners do not make a serious attempt to carry their difficult burden of demonstrating compelling reasons for this Court to grant certiorari review, they blithely disregard the serious and substantial issues raised by the Writ - to wit, disregard of

Supreme Court precedent and conflicts with other circuit courts as to: 1) Whether a corporate chapter 7 bankruptcy debtor has a right to counsel in its own bankruptcy liquidation proceeding; 2) whether a corporate chapter 7 bankruptcy debtor and/or its board of directors and/or its chief executive officer itself have standing to challenge a bankruptcy filing purporting to be made on the corporation's behalf by an entity purporting to be a stockholder (whose status as such is disputed); and 3) can, as a matter of law, a disputed stockholder place a Nevada corporation into bankruptcy?

ARGUMENT

I. OWNERSHIP OF THE STOCK.

Respondents simply ignore both the fact that the negotiated and endorsed stock certificate states on its face "I hereby sell, assign and transfer unto Golden Meadows Properties, LLC 1,000,000 shares represented by the within Certificate" and that Utah Code Anno. §43-1-2 flatly and unequivocally states "Title to any security receipt. . . may be transferred by delivery by any person in possession of the same. . . A person to whom title is so transferred . . .shall have absolute title."

The Respondents' arguments are further flawed for two basic reasons: First, each lower court has followed lock step in claiming the issue was already decided without ever bothering to consider and examine the fact that the Court which supposedly decided the issue (State of Utah Third Judicial District Court Judge Medley), explicitly disavowed making the determination due to Respondents' having misrepresented that Court's ruling to the other courts. Respondents would prevent all appellate courts, including the Supreme Court, from realizing the basic issue of whether Judge Medley made a determination as to ownership and from having an evidentiary hearing to make an actual, substantive determination.. Second, Respondents would have the courts adopt a view that what people have said about the legal effect of a stock transaction

makes what they said the law, rather than the governing statutes. Respondents' argument is a very shaky "house of cards" which has fatal defects at its core.

Respondents keep repeating their litany of who said what about pledges, loans, security interests, etc., but ignore the defect of their premise - how parties characterize the legal effect of something does not constitute the governing law. Governing law, as established by statute and decided cases, determines the effect of legal documents and commercial transactions, not what people say about them. The face of the certificate and Utah Code Anno. §43-1-2 determines that the endorsement, negotiation and delivery of that stock certificate to Golden Meadows constitutes an "absolute transfer of title." Simply to repeatedly ignore this is one of the many travesties of this entire case.

II. A CORPORATE CHAPTER 7 BANKRUPTCY DEBTOR HAS STANDING AND A RIGHT TO COUNSEL IN ITS OWN BANKRUPTCY LIQUIDATION PROCEEDING.

This would seem obvious on its face, yet continues to be denied on faulty legal reasoning. The Tenth Circuit panel opinion departed from the accepted and usual course of judicial proceedings and has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. The concept promoted by Respondents that a legal person (a corporation) may be placed into bankruptcy by an imposter claiming absolute and exclusive authority to act and the corporate representatives not being able to challenge the imposter is simply a gross violation of fundamental notions of due process. The premise that a bankrupt person (which is how the Bankruptcy Code defines a corporation in bankruptcy, 11 U.S.C. §101(41)), may not have representation defies the plain language of the Bankruptcy Code and rules themselves, much less the Constitution. That lower

courts continue to disregard this fundamental error in an attitude of "let them eat cake" begs for this Court's attention. The premise of Respondents' and the Tenth Circuit panel that any debtor corporation has no standing or right to representation is based on plainly erroneous analysis of applicable Supreme Court precedent and governing statute.

Examination of Respondent's summary of Petitioners' contention about standing and the right to have legal counsel illustrates the Tenth Circuit panel opinion's deviation from this Court's holding in Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343 (1985). Respondents assert:

> Applying this Court's Weintraub decision, Petitioners had no standing once the chapter 7 bankruptcy case was filed, because the corporate debtor is managed only by the bankruptcy Trustee. Johnson repeatedly and erroneously claimed before the bankruptcy court, the federal district courts, the state trial courts, the Utah Court of Appeals, and the Utah Supreme Court, in numerous related proceedings that he was filing papers and appearing for and on behalf of LFI or LFI's "management," ostensibly Allen. LFI is a corporation and has been a chapter 7 debtor in bankruptcy since the Petition Date. When a corporation becomes a chapter 7 debtor (and, similarly, when a trustee is appointed for a corporation in a chapter 11 case), a bankruptcy trustee is appointed to take control of all of the corporation's property, including all rights and causes of action, and the corporate debtor's former management and directors are "completely ousted." See, Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343,348-54 (1985). See also 11 U.S.C. §323(a) (the bankruptcy trustee is the authorized "representative of the estate"). As of the Petition Date, the Trustee is the "management" of LFI, and the Trustee and her appointed counsel are the only authorized representatives of LFI.

Other than misleading this Court about the extent of former counsel Johnson's appearances who never appeared before the Utah Court of Appeals or Supreme Court, a significant problem with the insistence on this premise, which is incorrect in itself, is that if the bankruptcy petition is ***NOT*** properly filed by persons having authority to act for a corporation, there is no valid bankruptcy court jurisdiction to begin with and there should be no appointment of a trustee. An invalid case does not have a trustee with any lawful authority. Its goes to the very heart of validity of the filing and jurisdiction of the court. Claiming only a trustee can challenge the legitimacy of the filing puts the proverbial "cart before the horse." There is a continuing failure to distinguish between the debtor itself and the bankruptcy estate, a separate legal entity.

What the panel and Respondents ignore in the Weintraub decision, which was about exercise of waiving attorney/client privilege and not standing, was that the Supreme Court recognized two things - continued existence of management and therefore, the corporation, and their ability to conduct certain corporate functions. While "completely ousted" was used in one cast off phrase, the rest of the quoted opinion said "severely limited" ***NOT*** "eliminated;" it said "virtually no management powers," ***NOT*** "none." The Panel's holding and Respondent's argument is to the contrary of exactly what the Supreme Court held and is at odds with this framework of post-bankruptcy corporate existence outlined by the U.S. Supreme Court and the plain language of the Bankruptcy Code.

Respondents continue to claim that corporate existence terminates upon the filing of bankruptcy. This is another key defect in this case. This is simply not supported by any construction, strict or liberal, of the plain language of the Bankruptcy Code and is indeed contrary to such language. 11 U.S.C. §554(c) states:

> Unless the court orders otherwise, any property scheduled under section 521 (1) of this title not otherwise administered at the time of the closing of a

> case is abandoned to the debtor and administered for purposes of section 350 of this title.

11 U.S.C. §726(a) states, "Except as provided in section 510 of this title, property of the estate shall be distributed—. . .(6) sixth, to the debtor."

The Code does not say, nor in any way, shape or form state or contemplate "only to natural person debtors." 11 U.S.C. §541 (which defines the bankruptcy "estate") nowhere claims one estate is created for natural persons and another for corporate legal persons. There must be a continued existence of the entity in order for there to be anything which can be abandoned or distributed to. A debtor is defined as including corporations. The interpretation that no corporate existence continues would render these portions of the code superfluous for corporations and is an incorrect methodology for statutory construction, Duncan v. Walker, 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001).

A philosophy that anyone claiming authority can place I.B.M. or Microsoft into voluntary bankruptcy and deny those entities the ability to retain legal counsel to challenge the filing is simply bizarre. Yet, that is exactly what Respondents argue in this case, as they did before U.S. District Court for the District of Utah Chief Judge Dee Benson (Transcript from May 14, 2004):

"THE COURT: Let me ask you something about bankruptcy law then. For hypothetical purposes if some person comes into Bankruptcy Court and files a Chapter 7 bankruptcy petition on behalf of a company that the person claims to have authority to act on behalf of, do you follow me?

"MR. WATERMAN: Yes.

"THE COURT: The case gets filed. Let's say it is I.B.M. Corporation and somebody comes in and files a bankruptcy. A trustee gets appointed, correct?

"MR. WATERMAN: That is correct.

"THE COURT: Now, if that person had no authority whatsoever, and the real C.E.O. and authorized person for I.B.M. comes marching into the Bankruptcy Court with that person's attorney and says, wait, this is all wrong. That person who took out the petition and has I.B.M. header for Chapter 7 proceedings did not have the authority to do it. You have got to stop this nonsense. The Bankruptcy Court would simply say, as Judge Clark did in this instance, oh, you have no authority here. The only person with authority is the duly appointed trustee in bankruptcy for I.B.M. Corporation."

Holding that the bankruptcy court need not determine the authority of the persons purporting to act on behalf of a corporate entity under governing state law clearly conflicts with Price v. Gurney, 323 U.S. 696 (1944). Most critically in this respect, Nevada state law does not terminate corporate existence after bankruptcy.

III. SHAREHOLDERS MAY ***NOT*** PLACE CORPORATIONS INTO BANKRUPTCY UNDER NEVADA LAW.

Respondents assert:

> As the lower courts correctly determined, Nevada law permits any action to be taken by written consent of the shareholders without a meeting that could be taken at a meeting. See, Nev. Rev. Stat. §§78.320, 78.325 and 78A.070. Moreover, §2.8 of Log Furniture's By-Laws also provides that any action that may be taken by shareholders at a meeting may be taken by written consent of the shareholders without a meeting: "Any action which may be taken at a meeting of the Shareholders may be taken by written consent without a meeting if such action is taken in conformance with the Nevada Corporations Code."

This reasoning simply does not address the issue. The issue is not whether shareholders conducted a meeting or not, or whether shareholders can vote by "consent" as opposed to physically holding a meeting (of course they can). The issue is whether shareholders, with or without a meeting, can place a corporation into bankruptcy. Respondents, as did the bankruptcy court, noticeably fail to address the governing Nevada statute and overtly rely on inapplicable portions of Nevada law dealing with closed corporations (governed by Title 78A, Nevada Revised Statutes), not with ordinary private corporations (governed by Title 78) as is Log Furniture, Inc. Relying on statutes relating to "shareholder consent" and "closed corporations" (a statutorily designated entity), is an attempt to continue confusing the courts reviewing this serious matter.

Nevada Revised Statute §78.120 mandates that the business of the corporation be conducted through the directors - "The business of every corporation ***must*** be managed by a board of directors or trustees, ***all of whom must be natural persons who are at least 18 years of age*** [emphasis added]." Nevada Revised Statute §78.115 mandates that there be at least one director - "A corporation must have at least one director...[emphasis added]." Consequently, any person claiming to have "eliminated" a board of directors of a Nevada corporation would be making a false representation. Nevada law requires the director be a "natural person" so, apart from the elimination of the existing board being a nullity at law, appointment of a limited liability company as a director is also a nullity. There is not a "natural person" who filed the Petition in this case. It was signed by David Harris as "President of Machinery Hardware & Supply, Manager of Granite Stone, L.C." i.e. the CEO of a corporation acting as manager for a limited liability company which purports to act as a shareholder. Harris does not purport himself to be an officer or director or shareholder of Log Furniture, Inc. The voting rights of stockholders defined by Nevada Revised Statutes §78.350 ***does not*** include the management authority delegated to the

directors. NRS §78.580 explicitly regulates winding up and dissolution of a corporation being in the sole authority of the board. This contrary notion of shareholder ability to manage and place in bankruptcy violates the public policy established by the Nevada legislature and the plain language of the Nevada statutes. A bankruptcy judge sitting in Utah does not have the power and authority to rewrite Nevada statutes.

The Bankruptcy Court, District Court and Tenth Circuit Court panel opinion completely disregard this law and undermine the requirements of this Court made in Price v. Gurney, 323 U.S. 696 (1944) and their decisions, therefore, deviate from the law as established by the U.S. Supreme Court:

> The District Court in passing on petitions filed by corporations under Chapter X must of course determine whether they are filed by those who have authority so to act. ***In absence of federal incorporation, that authority finds its source in local law. If the District Court finds that those who purport to act on behalf of the corporation have not been granted authority by local law to institute the proceedings, it has no alternative but to dismiss the petition.*** It is not enough that those who seek to speak for the corporation may have the right to obtain that authority. . . But nowhere is there any indication that Congress bestowed on the bankruptcy court jurisdiction to determine that those who in fact do not have the authority to speak for the corporation as a matter of local law are entitled to be given such authority and therefore should be empowered to file a petition on behalf of the corporation. [Emphasis added].

Rulings by the lower courts in this case also conflict with another Court of Appeals holding, albeit under different circumstances but with respect to the same proposition-determining legal authority to file for a corporation, stated in Keenihan v. Heritage Press Inc., 19 F.3d 1255 (8th Cir. 1994):

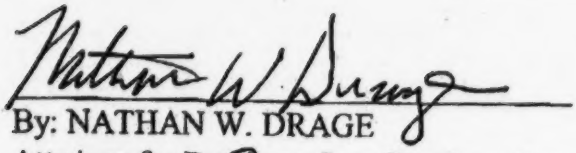
> [W]e believe it ***improper*** for the bankruptcy court to assume jurisdiction over a case simply because there is debt involved; in short, there first must be valid jurisdiction over the matter before a bankruptcy court can proceed. In the absence of a valid petition, a bankruptcy court has no basis upon which to dispose of a corporation's assets or resolve its debt status. [Emphasis added]

CONCLUSION

Respondents note that a petition for a writ of certiorari should be granted only for compelling reasons. Respondent's have expended in excess of $500,000 in pursuing a collection matter involving less than $20,000. That alone should cause the courts to wonder "why" and take a closer look at the facts and the law. Petitioner Cari Allen as a matter of last resort, seeks for this Court to end the economic rape that has reduced her to choosing between eating, or photocopying documents for filing with the numerous courts below. Tremendous lawyer resources, in the form of numerous attorneys from one of the largest law firms in Utah, have been amassed against her in every way as she has tried to recover from a wrongful bankruptcy filing on the company she invested years to build.

Petitioners claim due process has been denied by the wrongful and un-authorized filing of a petition of bankruptcy for Log Furniture, Inc., a Nevada corporation. Just because that corporation is not I.B.M. or Microsoft, does not minimize or invalidate the due process rights of the Petitioners and the substantial public policy in requiring that the bankruptcy courts follow the law: 1) factually determine who is authorized to file the petition, 2) allow the corporation to be represented by those who claim the filing is invalid, and 3) apply the correct state corporate statutes to the case.

Respectfully submitted,



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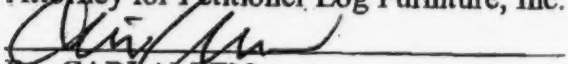

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